

**IMPLEMENTATION AGREEMENT**

**for**

**THE CITY OF SEATTLE'S  
CEDAR RIVER WATERSHED  
HABITAT CONSERVATION PLAN**

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Exhibit A: List of “Covered Species”

Exhibit B: List of Species Qualifying as “Pay-as-You-Go” Species

## 1.0 PARTIES

The parties to this Implementation Agreement are the City of Seattle (“City” or “Permittee”), a Washington municipal corporation, the United States Fish and Wildlife Service (“FWS”), and the National Marine Fisheries Service (“NMFS”). In this agreement, FWS and NMFS are collectively referred to as the “Services.”

## 2.0 RECITALS AND PURPOSES

**2.1 Recitals.** The parties have entered into this agreement in consideration of the following facts:

(a) The City’s covered activities, as defined in paragraph 3.2 of this agreement, may affect habitat of the covered species named in paragraph 3.4; and

(b) The City has developed a series of measures, described in the habitat conservation plan (“HCP”), to minimize and mitigate to the maximum extent practicable the effects of any take which may occur incidental to its covered activities; and

(c) The Services have fully reviewed the City’s HCP and this agreement, and found them to meet all requirements under the Endangered Species Act (“ESA”), 16 U.S.C. 1531 *et seq.*, for issuance of an Incidental Take Permit, as described below in paragraph 4.2.

**2.2 Purposes.** The purposes of this agreement are:

(a) To ensure implementation of each of the terms of the HCP;

(b) To describe remedies and recourse should any party fail to perform its obligations as set forth in this agreement; and,

(c) To provide assurances to the City that as long as the terms of the HCP, the permit, and this agreement are performed in all respects material to achieving the conservation objectives of the HCP, no additional mitigation will be required of the City for covered activities under the ESA, except as provided for in this agreement, unless required by subsequent amendments to the ESA. The parties intend that this agreement, together with the related agreements identified in paragraph 3.12, shall constitute a full and complete settlement of the City’s legal obligations under the ESA, with respect to covered activities and covered species.

## 3.0 DEFINITIONS

The following terms as used in this agreement will have the meanings set forth below:

**3.1 Terms defined in Endangered Species Act.** Terms used in this agreement and specifically defined in the ESA or in regulations adopted by the Services under the ESA have the same meaning as in the ESA and those implementing regulations, as they exist on the effective date of this agreement except to the extent that any amendment of such regulation was required by statute or court order, or unless otherwise agreed by the parties.

**3.2 “Covered activities”** means the following activities carried out or authorized by the City on covered lands and on any additional lands and waters to which the HCP’s conservation measures apply, as described in section 1.3 of the HCP:

(a) Operation of a municipal water supply on the Cedar River and a hydroelectric power plant at Cedar Falls, with their attendant facilities. With regard to the waters downstream of Landsburg, the term is restricted specifically to the impacts of City operations and facilities on species using those waters and covered by this agreement, and does not apply to the impacts of activities by other public agencies or private parties or to City facilities outside the Cedar River Municipal Watershed.

(b) Watershed management and forest practices, including actions to protect and restore watershed habitats, harvest of timber for restoration or administrative purposes, reconfiguration, removal, and maintenance of forest roads, and sale of forest products incidental to restoration activities;

(c) Mitigation, conservation, research, and monitoring activities carried out under the HCP and the related agreements; and

(d) Educational activities within the Cedar River Municipal Watershed, including operation of educational and cultural facilities such as the planned educational resource center at Cedar Falls, and operation of research, education, and cultural resource management programs, provided that such activities do not materially increase levels of take from those existing at the time of permit issuance.

Implementing regulations for the National Historic Preservation Act (“NHPA”), 16 U.S.C. 470f, allow for the designation of a lead agency for actions that involve more than one Federal agency. It has been determined that NMFS will serve as the Agency Official on behalf of the FWS for purposes of compliance with section 106 of the NHPA for the Cedar River HCP and its associated incidental take permits. Consistent with the NMFS permit, the FWS permit will not cover activities that may adversely affect any site, building, structure, or object that is included in, or eligible for inclusion in, the National Register of Historic Places, until completion of any consultation that may be required under Section 106 of the NHPA with regard to that activity.

**3.3 “Covered lands”** means the City-owned lands upon which the permit authorizes incidental take of covered species. It includes the Cedar River Municipal Watershed, totaling approximately 90,546 acres and shown on Map 3 in the HCP.

**3.4** “Covered species” means the listed and unlisted species identified in Exhibit A to this agreement, each of which the Services have determined the HCP addresses in a manner sufficient to meet all of the criteria for issuing an incidental take permit under ESA § 10(a)(1)(B), pursuant to findings contained in the Services’ section 10 findings documents for this HCP. Currently listed species include the following:

- (1) Northern spotted owl (*Strix occidentalis caurina*);
- (2) Marbled murrelet (*Brachyramphus marmoratus*);
- (3) Bald eagle (*Haliaeetus leucocephalus*);
- (4) Grizzly bear (*Ursus arctos*);
- (5) Gray wolf (*Canis lupus*);
- (6) Chinook salmon (*Oncorhynchus tshawytscha*);
- (7) Bull trout (*Salvelinus confluentus*);
- (8) Canada lynx (*Lynx canadensis*)

**3.5** “**Force majeure**” means events that are beyond the reasonable control of, and that did not occur through the fault or negligence of, the City or any entity controlled by the City, including its contractors and subcontractors to the extent they are carrying out authorized activities, including but not limited to: acts of God; sudden actions of the elements, including fire; or actions of federal or state agencies or courts, or other local jurisdictions.

**3.6** “HCP” means the habitat conservation plan prepared by the City for covered activities.

**3.7** “Listed species” means a species (including a subspecies or a distinct population segment or an evolutionarily significant unit of a vertebrate species) that is listed as endangered or threatened under ESA.

**3.8** “Oversight Committee” or “OC” means the oversight group established pursuant to paragraph 13.1.

**3.9** “Permit” means the incidental take permit issued by the Services to the City pursuant to section 10(a)(1)(B) of ESA for take incidental to covered activities, as it may be amended from time to time.

**3.10** “Permittee” means the City of Seattle.

**3.11 “Related agreements”** means the Instream Flow Agreement (“IFA”) and the Landsburg Mitigation Agreement (“LMA”).

**3.12** With regard to listed species, **“take”** means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. **“Harm”** means an act that actually kills or injures a member of a listed species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a listed species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

**3.13 “Unforeseen circumstances”** means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the Service at the time of the conservation plan’s negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

**3.14 “Unlisted species”** means a species (including a subspecies or a distinct population segment or an evolutionarily significant unit of a vertebrate species) that is not listed as endangered or threatened under the ESA.

## **4.0 OBLIGATIONS OF THE PARTIES**

**4.1 Obligations of the City.** The City agrees to perform all obligations assigned to it under this agreement, the permit, and the HCP.

**4.2 Obligations of the Services.** Upon execution of this agreement by all parties, and satisfaction of all other applicable legal requirements, the Services will issue to the City a permit under section 10(a)(1)(B) of the ESA, authorizing incidental take of each listed covered species resulting from covered activities on covered lands. The permit will be conditioned on compliance with all terms and conditions of the HCP, and this agreement, in all respects material to achieving the conservation objectives of the HCP.

4.2.1 Permit coverage. The permit will identify all covered species. The permit will take effect for listed covered species at the time the permit is issued, and for unlisted covered species, upon the listing of such species.

4.2.2 “No surprises” assurances. Provided that the City has complied fully with its obligations under the HCP, this agreement, and the permit, the Services may require it to provide mitigation beyond that provided for in the HCP only under unforeseen circumstances, and only in accordance with the “no surprises” regulations at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5), 222.22(g).

4.2.3 Water supply protection. Nothing in this agreement shall be construed to give the Services the authority to impose or seek to impose measures additional to those specified in the HCP or this agreement that would degrade drinking

water quality, trigger a need for additional water treatment, or cause a reduction in yield for water supply.

**4.3 Interim obligations upon a finding of unforeseen circumstances.** If the Services make a finding of unforeseen circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, the City will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

## **5.0 INCORPORATION OF HCP**

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this agreement and the HCP, the terms of this agreement will control. In all other cases, the terms of this agreement and the terms of the HCP will be interpreted to be supplementary to each other.

## **6.0 TERM**

**6.1 Initial term.** After signature by all parties, this agreement and the HCP will become effective on the date that the Services issue the permit. This agreement, the HCP, and the permit will remain in effect for a period of forty nine years beyond the end of HCP Year One, as defined below, except as provided below.

**6.2 Schedule convention.** “HCP Year 1” of the schedule of activities described in the HCP shall be defined as the period from the effective date until the end of the first full calendar year following that date. For example, if this agreement becomes effective in January 2000, HCP Year 1 shall run from January 2000 through December 2001. “HCP Year 2” and all succeeding HCP Years shall coincide with the calendar years that follow the end of HCP Year 1.

**6.3 Permit suspension or revocation.** The Services may suspend or revoke the permit only for cause, and only in accordance with regulations in force at the time of such suspension or revocation. (These regulations are currently codified at 50 C.F.R. §§ 13.27 through 13.29, and 222.27, and 15 C.F.R. Part 904.) Such suspension or revocation may apply to the entire permit, or may apply only to specified covered species, covered lands, or covered activities. In the event of suspension or revocation, the Services will review all relevant data to determine whether take of the Covered Species listed in Exhibit A to this agreement or added to the incidental take permit after the effective date of the HCP, occurring prior to the date of suspension or revocation, has been substantially mitigated in accordance with the permit conditions. If the Services demonstrate that take of such species that occurred during the term of the permit has not been substantially mitigated, they may require continuation of specified HCP activities until such time as mitigation is substantially completed. Substantial mitigation will have occurred if the mitigation that has been provided under the HCP at least compensates for the take that has occurred under the permit as of that date.

**6.4 Relinquishment of the permit.** The City may voluntarily relinquish the permit and discontinue HCP implementation. In the event of relinquishment, for any of the Covered Species listed in Exhibit A to this agreement, or added to the incidental take permit after the effective date of the HCP, that are not listed as “pay-as-you-go species” in Exhibit B to this agreement, the Services will review all relevant data to determine whether take of any of these species, occurring prior to the date of permit relinquishment, has been substantially mitigated in accordance with the permit conditions. If the Services demonstrate that take of such species that occurred during the term of the permit has not been substantially mitigated, they may require continuation of specified HCP activities until such time as mitigation is substantially completed. Substantial mitigation will have occurred if the mitigation that has been provided under the HCP at least compensates for the take that has occurred under the permit as of that date.

**6.5 Treatment of unlisted species.** For purposes of paragraph 6.3 and 6.4, unlisted covered species will be treated as though they were listed species in determining the amount of take and the mitigation required.

## **7.0 FUNDING AND ACCOMPLISHMENT OF THE HCP**

**7.1 Funding commitment.** The City will fully fund the commitments it makes in the HCP, subject to the constraints identified below. Funding will be from sources at the City’s discretion, including funding from outside sources such as grants or contributions.

**7.2 Availability of funds.** Implementation and ongoing adherence to the HCP and this agreement by all parties shall be subject to the availability of appropriated funds. Failure by the City to ensure adequate funding to implement the HCP may be grounds for suspension or partial suspension of the permit. The City will promptly notify the Services of any material change in its funding resources, and will cooperate with the Services to minimize the adverse effects of any such change on the conservation goals of the HCP.

**7.3 Efficient use of funds.** All parties shall support the efficient and effective use of funds to accomplish the goals, objectives, and elements of the HCP within the cost constraints and fund transfer limitations described below.

**7.4 Cost categories and constraints.** The HCP sets forth at section 5.3 the total amount of money that the City will spend in order to meet its affirmative obligations under the HCP. The City agrees to spend this full amount of money regardless of whether cost savings are achieved on individual portions of the HCP. In the event that the City is able to fulfill its obligations under the HCP at a cost that is lower than the amount allotted for any particular Cost Category, the City will use the remainder of that allotted amount for other actions that the parties agree will provide conservation benefits to covered species. Unless otherwise required by provisions of this or the Related Agreements, the highest priority for spending such amounts shall be habitat acquisition,

preservation and restoration of riparian habitat in the Lake Washington Basin for the benefit of all anadromous fish species. The City will not be required to exceed the total funding commitment in the HCP, unless it agrees to do so through the amendment process. The costs identified for the eight specific sub-divisions of HCP activities, called “Cost Categories” and described below, similarly represent maximum levels which will not be exceeded. That is, the City commits to fully funding each of those Cost Categories, but will not exceed the total for each, and cannot transfer funds among the different Cost Categories without an HCP amendment, as provided in paragraph 7.5. In addition, any transfer of funds must be consistent with paragraph 9.4. Unless the City specifically agrees otherwise, funds are not transferable between operating and capital project components of the HCP. The constraints on funding set forth in this section apply only to expenditures of funds by the City, and not to any deferred or foregone revenues that the City might, in the absence of the HCP, have derived from the sale of water, timber, or other resources.

**7.5 Transfers of funds between Cost Categories.** The parties recognize that in order to effectively achieve the overall conservation objectives of the HCP, there may be situations in which transfers of funds between Cost Categories will be appropriate. Such transfers shall be accomplished through amendment of the HCP, as provided in part 12.0, after consultation with the Oversight Committee.

**7.6 Transfers of funds within Cost Categories.** Unless otherwise provided in either the IFA or the LMA, the City shall have the authority to make transfers of funds among activities within a Cost Category, provided that such transfers do not exceed \$50,000, are described in periodic reports to the Oversight Committee, do not affect the City’s ability to accomplish agreed-upon elements of the HCP, and do not compromise the overall purposes and objectives of the HCP. Transfers within a Cost Category above \$50,000 are subject to the approval of the appropriate parties, after consultation with the Oversight Committee. The eight Cost Categories and the parties whose approval is required for transfers over \$50,000 are as follows:

- (a) Watershed Protection and Restoration (section 4.2 of the HCP). Approval by all parties to this agreement.
- (b) Instream Flow Management (section 4.4.2 of the HCP). Approval by all parties to the IFA.
- (c) Steelhead and coho and chinook salmon mitigation (section 4.3.2 of the HCP). Approval by all parties to the LMA.
- (d) Sockeye mitigation (section 4.3.2 of the HCP). Approval by all parties to the LMA.
- (e) Watershed research and monitoring (sections 4.5.4 and 4.5.5 of the HCP). Approval by all parties to this agreement.

(f) Instream flow research and monitoring (sections 4.5.2 and 4.5.6 of the HCP). Approval by all parties to the IFA.

(g) Steelhead and coho and chinook salmon research and monitoring (section 4.5.3 of the HCP). Approval by all parties to the LMA.

(h) Sockeye research and monitoring (section 4.5.3 of the HCP). Approval by all parties to the LMA.

**7.7 Representation of costs and adjustment for inflation.** All cost estimates and commitments in the HCP are given in 1996 dollars. These figures will be adjusted annually each full year after 1996 for inflation or deflation, based on the “Consumer Price Index for All Urban Consumers” published by the Bureau of Labor Statistics of the U. S. Department of Labor. If this index is discontinued or becomes unavailable, a comparable index will be designated by the parties. The inflation adjustment established in this subsection shall also apply to the \$50,000 cap on City-initiated fund transfers referenced in paragraph 7.6.

**7.8 Accomplishment of the HCP.** The City retains authority to determine how HCP activities will be accomplished, including who will conduct the actual work. However, the City will consider cooperative agreements with any of the agencies and/or the Muckleshoot Indian Tribe as a means of accomplishing some activities, including the use of agency or tribal staff, as allowed under law.

**7.9 Schedule of activities.** The general schedule for expenditures and other activities is specified in the HCP. The City may, after consultation with the Oversight Committee but without amendment to the HCP, defer or delay activities for a period not to exceed two years from that indicated, except for matters addressed in the IFA or LMA, which shall remain subject to the schedules provided in those agreements. Such delays, and the reasons therefor, shall be described in periodic committee meetings and compliance reports.

## **8.0 MONITORING AND REPORTING**

**8.1 Planned periodic reports.** As described in the HCP, the City will submit periodic reports describing its activities and the results of the monitoring program provided for in the HCP. Each report will be signed by a responsible City official who has ensured that the report is accurate and complete.

**8.2 Other reports.** Except where prohibited by the Washington Public Disclosure Act, the City will provide, within thirty days of being requested by the Services, any existing information in its possession or control related to implementation of the HCP that is requested by the Services.

**8.3 Monitoring by Services.** The City will cooperate with the Services’ oversight and monitoring of activities carried out to implement the HCP, including

permitting the Services entry, after reasonable notice, onto covered lands controlled by the City for purposes of performing inspections in accordance with applicable regulations. The Services shall allow City representatives to accompany Service personnel. To assist the City in meeting its obligations under this agreement, the City may request the Services to provide a written report describing the factual information learned during any inspection.

## **9.0 ADAPTIVE MANAGEMENT**

**9.1 Implementation of the HCP's adaptive management provisions.** The City will implement the HCP's adaptive management provisions, which identify changes in HCP management practices that are necessary to respond to specified monitoring results, changed circumstances, or new scientific information, if applicable. Such changes are provided for in the HCP, and hence do not constitute unforeseen circumstances or require amendment of the permit or HCP, except as provided in this section. Funding or other commitments of resources for any additional mitigation developed under adaptive management during implementation of the HCP shall be subject to the cost constraints of part 7.0, unless the City agrees otherwise.

**9.2 Criteria for application of adaptive management.** Chapter 4 of the HCP contains a description of the biological objectives for covered species. By the end of HCP Year 3, the parties to this agreement shall develop and agree on criteria for the application of adaptive management to meet the HCP's biological objectives, for those activities which are initiated or ongoing in that time period, and shall identify the schedule for preparation of any additional adaptive management plans for the remaining years of the HCP. These criteria for adaptive management shall include the following:

- (a) a general monitoring and/or research plan based on explicit hypotheses;
- (b) threshold criteria for triggering additional or changed mitigation;
- (c) a procedure for dispute resolution over interpretation of results consistent with dispute resolution procedures specific to the relevant agreement;
- (d) limits to type of and commitments to any long-term mitigation triggered by monitoring criteria; and
- (e) a process for developing and implementing any additional mitigation for which the need is demonstrated. The process shall clearly identify the responsibilities of all parties.

**9.3 Reductions in mitigation.** The City will not implement adaptive management changes that may result in significantly less mitigation than provided for under the original terms of the HCP, unless the Services first provide written approval. Reduction of specific mitigation may be allowed if such changes maintain or increase the

net biological benefits of the HCP. The City may propose any such adaptive management changes by written notice to the Services, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on covered species, and impacts to other elements of the human environment. Within 135 days of receiving such a notice, the Services will either approve the proposed adaptive management changes, approve them as modified by the Services, or notify the City that the proposed changes constitute permit amendments that must be reviewed under paragraph 12.2 of this agreement.

**9.4 No increase in take.** This part 9.0 does not authorize any modifications that would result in an increase in the amount and nature of take, or increase the impacts of take, of covered species beyond that analyzed under the original HCP and any amendments thereto. Any such modification must be reviewed as a permit amendment under paragraph 12.2 of this agreement.

## **10.0 LAND TRANSACTIONS**

**10.1 Acquisition of land by the City.** Nothing in this agreement, the HCP, or the permit limits the City's right to acquire additional lands in the Cedar River watershed. However, such lands will not be covered by the permit except upon amendment as provided in paragraph 12.2 of this agreement.

**10.2 Disposal of land by the City.** In the event that the City wishes to dispose of lands in the covered area by transfer, sale, or exchange, the City shall follow the procedures outlined below.

(a) The disposition may occur without consequence under this agreement, provided that:

(1) The City has given the Services 60 days advance notice prior to disposing of the land;

(2) The parcel disposed of does not exceed 640 acres in size;  
and

(3) The cumulative total of land disposals, beginning from the effective date of this agreement, does not exceed 1,920 acres per township, or a total of 6,338 acres.

(b) In all other circumstances, the City shall consult with the Services at least 180 days prior to disposition of the land. If the Services determine that such disposition will compromise the effectiveness of the HCP, then prior to property transfer, the parties shall negotiate conditions on the property transfer, or alternative mitigation, sufficient to avoid such compromise.

## **11.0 FORCE MAJEURE**

**11.1 Force majeure procedures.** In the event that the City is wholly or partially prevented from performing obligations under this agreement because of a force majeure event, the City will be excused from whatever performance is affected by such force majeure event to the extent so affected, and such failure to perform will not be considered a material breach, provided that nothing in this section will be deemed to authorize the City to violate the ESA or render the goals of the HCP unobtainable, and provided further that:

(a) The suspension of performance is of no greater scope and no longer duration than is reasonably required by the force majeure;

(b) The City notifies the Services orally within a reasonable time (normally not to exceed 72 hours) after becoming aware of any event that the City contends constitutes a force majeure, and in writing within seven (7) calendar days after the event. Such notice will: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures. This notice shall not be required where the Services have actual notice of delays through participation in Oversight Committee proceedings;

(c) The City uses its best efforts to avoid and mitigate the effects of any delay upon its ability to perform. A force majeure event may require use of the adaptive management provisions of this agreement and the HCP in remedying the effects of the force majeure event; and

(d) When the City is able to resume performance of its obligations, it provides the Services written notice to that effect.

**11.2 Termination through force majeure.** Any party may terminate the permit if a force majeure event renders the goals of the HCP unobtainable. Post-termination mitigation otherwise required under part 6.0 of this agreement may, where reasonable, still be required in the event of early termination resulting from a force majeure, to the extent that such mitigation remains feasible on covered lands.

## **12.0 MODIFICATIONS AND AMENDMENTS**

### **12.1 Minor modifications.**

(a) Any party may propose minor modifications to the HCP or this agreement by providing written notice to all other parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under the HCP and on covered species. The parties will use best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon all

other parties' written approval. If, for any reason, a receiving party objects to a proposed modification, it must be processed as an amendment of the permit in accordance with subsection 12.2 of this section. The Services will not propose or approve minor modifications to the HCP or this agreement if the Services determine that such modifications would result in operations under the HCP that are significantly different from those analyzed in connection with the original HCP, or would result in adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or additional take not analyzed in connection with the original HCP.

(b) Minor modifications to the HCP and IA processed pursuant to this subsection may include but are not limited to the following:

- (1) corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning;
- (2) correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the permit or HCP;
- (3) minor changes to survey, monitoring or reporting protocols;
- (4) changes to the boundaries of the ecological reserve as shown in Map 15 of the HCP, provided that there is no net loss of total acreage or functionality for covered species;
- (5) minor corrections and adjustments to the HCP. The HCP, including its appendices, is a very lengthy and complex document, and the parties recognize that various minor and non-controversial corrections and adjustments may from time to time be required.

(c) Any other modifications to the HCP or IA will be processed as amendments of the permit in accordance with subsection 12.2 of this section. However, the following activities shall not be considered modifications, minor or otherwise:

- (1) Transfer of funds under \$50,000, as provided in paragraph 7.6.
- (2) Deferral of the date of accomplishment of certain actions or expenditures specified in the HCP, as provided in paragraph 7.9.
- (3) Decisions on specific design details for facilities, studies, projects, or adaptive management strategies identified in the HCP.

## **12.2 Amendment of the Permit.**

(a) The permit may be amended in accordance with all applicable legal requirements, including but not limited to the ESA, the National Environmental Policy Act, and the Services' permit regulations. The party proposing the amendment shall provide a statement of the reasons for the amendment and an analysis of its environmental effects, including its effects on operations under the HCP and on covered species.

(b) If the City proposes to add a species to the permit, the appropriate Service will determine whether such addition would meet the permit issuance criteria under ESA section 10(a)(2)(B).

## **13.0 OVERSIGHT, ENFORCEMENT, AND DISPUTE RESOLUTION**

**13.1 HCP Oversight Committee.** The City shall establish an HCP Oversight Committee ("OC") to advise it in carrying out its responsibilities under the HCP. The OC shall function as described below.

13.1.1 Membership. Each signatory to this agreement or to either of the two related agreements, and the Muckleshoot Indian Tribe if not a signatory to any agreement, shall have one designated member. In the event that another entity later signs an agreement with the City adopting the provisions of the IFA or LMA, that entity shall also be entitled to have a designated member of the OC. In addition, there shall be a group of non-party Advisors who may participate in OC discussions and otherwise advise the City concerning HCP issues. Advisors shall be named by the City after consultation among the parties, with the objective of including a broad range of interest and expertise, including one representative with knowledge of forest science. King County shall have one advisory representative on the OC, contingent on the County's written endorsement of the HCP.

13.1.2 Duties and authority. The OC's function is to advise the City concerning HCP implementation, and its authority is limited to that which is expressly granted by the terms of this agreement. It shall serve as a forum for: (i) communication regarding implementation of the HCP; (ii) identification of issues that need discussion and resolution; and (iii) periodic review of HCP progress. The OC cannot override the decisions or actions taken under the IFA or LMA.

13.1.3 Procedures for acting. In carrying out authority specifically granted in this agreement, the OC shall formally consider issues and act as a body only at a meeting convened by the City, after reasonable notice.

13.1.4 Schedule of meetings. The OC shall meet at least annually, except that it may adopt a reduced meeting frequency after the first decade of the HCP if a majority of the designated members agree that a reduced frequency is adequate. In addition, it may be convened by request of a majority of the designated members.

13.1.5 Administration. To fulfill the above functions, the OC will, by consensus, adopt by-laws to govern administrative matters such as identification of and changes in representatives; notices; record-keeping; frequency of meetings; and mechanisms for convening the committee. The City shall provide administrative support for the operation of the OC, and shall convene and chair all meetings.

13.1.6 Other HCP oversight groups. An Anadromous Fish Committee and an Instream Flow Commission have been established through the related agreements to advise the City concerning HCP issues, and they shall function as described in those agreements. Additional subcommittees or working groups may also be established as appropriate, with membership and administrative rules as the City shall determine, in consultation with the OC. The City shall establish, convene and chair all such groups, as well as providing administrative support.

**13.2 Comprehensive Reviews.** The OC will conduct periodic comprehensive reviews of activities conducted pursuant to the HCP to evaluate overall progress on implementation, and to identify and address significant issues. When appropriate, the members shall consult with one another in good faith to identify any proposed amendments that might more effectively and economically mitigate any incidental take. The OC shall conduct comprehensive reviews within six months of the end of HCP Years 2, 5, 8, 11, 15, and at subsequent five-year intervals for the full term of this agreement. Upon mutual agreement of all the parties, additional reviews may be scheduled at any time.

**13.3 Enforcement.** Except as set forth below, each party shall have all remedies otherwise available in equity to enforce the terms of this agreement, the permit, and the HCP.

**13.4 No monetary damages.** No party shall be liable in damages to any other party or other person for any breach of this agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this agreement, or any other cause of action arising from this agreement.

**13.5 Rights preserved.** The HCP, this agreement, and the permit shall be interpreted and administered in accordance with the ESA. Nothing contained in this agreement is intended to limit the authority or responsibility of the United States government or the City to fulfill their respective responsibilities as public agencies in accordance with law. Nothing in the Cedar River Watershed Habitat Conservation Plan, the Implementation Agreement, the Related Agreements, or the Incidental Take Permit shall in any way affect or limit, or be deemed an adjudication of any Indian right reserved by Treaty, Executive Order or Statute. Further, nothing in this agreement shall limit any Tribe's right, or the United States' right as trustee, to bring an action to enforce or protect such an Indian reserved right.

**13.6 Dispute resolution.** The parties recognize that disputes concerning implementation of, compliance with, or termination of this agreement, the HCP, and the permit may arise from time to time. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the parties may later agree. However, if at any time any party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.

13.6.1 Informal dispute resolution process. Unless the parties agree upon another dispute resolution process, or unless an aggrieved party has initiated legal proceedings, the parties may use the following process to attempt to resolve disputes:

(a) The aggrieved party will notify the other parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.

(b) The party alleged to be in violation will have 30 days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.

(c) Within 30 days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

## **14.0 MISCELLANEOUS PROVISIONS**

**14.1 No partnership.** Neither this agreement nor the HCP shall make or be deemed to make any party to this agreement the agent for or the partner of any other party.

**14.2 Notices.** Any notice permitted or required by this agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail.

Assistant Regional Director  
United States Fish and Wildlife Service  
911 N.E. 11th Ave.  
Portland, Oregon 97232-4181  
Telephone: 503-231-6159  
Telefax: 503-872-2771

Regional Administrator  
National Marine Fisheries Service  
7600 Sand Point Way N.E.  
Seattle, Washington 98115-0070  
Telephone: 206-526-6150  
Telefax: 206-526-6426

Director of Seattle Public Utilities  
City of Seattle  
710 Second Avenue  
Seattle, Washington 98104  
Telephone: 206-684-5850  
Telefax: 206-684-4631

**14.3 Entire agreement.** This agreement, together with the HCP and the permit, constitutes the entire agreement among the parties. It supersedes any and all other agreements, either oral or in writing, among the parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any other party that is not embodied herein.

**14.4 Elected officials not to benefit.** No member of or delegate to Congress shall be entitled to any share or part of this agreement, or to any benefit that may arise from it.

**14.5 Availability of funds.** Implementation of this agreement and the HCP by the Services is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The parties acknowledge that the Services will not be required under this agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

**14.6 Duplicate originals.** This agreement may be executed in any number of duplicate originals. A complete original of this agreement shall be maintained in the official records of each of the parties hereto.

**14.7 No third-party beneficiaries.** Without limiting the applicability of rights granted to the public pursuant to the ESA or other federal law, this agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this agreement. The duties, obligations, and responsibilities of the parties to this agreement with respect to third parties shall remain as imposed under existing law.

**14.8 Contents not binding in other litigation.** The contents of the HCP, ITP, and this IA shall not be construed as statements against interest or admissions and are not binding in litigation except in matters related to enforcement by the parties to the IA of the HCP, ITP, and this IA. In addition, the City reserves the right to assert in any proceeding that its activities do not require an ITP.

**14.9 References to regulations.** Unless the parties agree otherwise, any reference in this agreement, the HCP, or the permit to any regulation of the Services shall be deemed to be a reference to such regulation as it existed on the effective date of the agreement, except to the extent that any amendment of such regulation was required by statute or court order.

**14.10 Applicable laws.** All activities undertaken pursuant to this agreement, the HCP, or the permit must be in compliance with all applicable state and federal laws and regulations.

**IN WITNESS WHEREOF**, the parties hereto have executed this Implementation Agreement to be in effect as of the date that the Services issue the permit.

**U.S. DEPARTMENT OF THE INTERIOR  
FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_  
Tom Dwyer  
Deputy Regional Director

Date: \_\_\_\_\_

**U.S. DEPARTMENT OF COMMERCE  
NATIONAL MARINE FISHERIES SERVICE**

By: \_\_\_\_\_  
William W. Stelle, Jr.  
Regional Administrator

Date: \_\_\_\_\_

**CITY OF SEATTLE**

By: \_\_\_\_\_  
Paul Schell  
Mayor

Date: \_\_\_\_\_

**Exhibit A: Covered Species.**

<b>Common Name</b>	<i>Latin Name</i>
<b>SPECIES OF GREATEST CONCERN</b>	
<b>Birds</b>	
Bald Eagle	<i>Haliaeetus leucocephalus</i>
Common Loon	<i>Gavia immer</i>
Marbled Murrelet	<i>Brachyramphus marmoratus</i>
Northern Goshawk	<i>Accipiter gentilis</i>
Northern Spotted Owl	<i>Strix occidentalis caurina</i>
Peregrine Falcon	<i>Falco peregrinus</i>
<b>Fish</b>	
Bull Trout	<i>Salvelinus confluentus</i>
Chinook Salmon	<i>Oncorhynchus tshawytscha</i>
Coho Salmon	<i>Oncorhynchus kisutch</i>
Pygmy Whitefish	<i>Prosopium coulteri</i>
Sockeye Salmon	<i>Oncorhynchus nerka</i>
Steelhead Trout	<i>Oncorhynchus mykiss</i>
<b>Mammals</b>	
Gray Wolf	<i>Canis lupus</i>
Grizzly Bear	<i>Ursus arctos</i>

**OTHER SPECIES OF CONCERN**

<b>Common Name</b>	<i>Latin Name</i>
<b>Birds</b>	
Band-tailed Pigeon	<i>Columba fasciata</i>
Black Swift	<i>Cypseloides niger</i>
Brown Creeper	<i>Certhia americana</i>
Golden Eagle	<i>Aquila chrysaetos</i>
Great Blue Heron	<i>Ardea herodias</i>
Harlequin Duck	<i>Histrionicus histrionicus</i>
Merlin	<i>Falco columbarius</i>
Olive-sided Flycatcher	<i>Contopus borealis</i>
Osprey	<i>Pandion haliaetus</i>
Pileated Woodpecker	<i>Dryocopus pileatus</i>
Rufous Hummingbird	<i>Selasphorus rufus</i>
Three-toed Woodpecker	<i>Picoides tridactylus</i>
Vaux's Swift	<i>Chaetura vauxi</i>
Western Bluebird	<i>Sialia mexicana</i>
Willow Flycatcher	<i>Empidonax traillii</i>
<b>Fish</b>	
Cutthroat Trout, sea run	<i>Oncorhynchus clarki</i>
Kokanee	<i>Oncorhynchus nerka</i>
Pacific Lamprey	<i>Entosphenus tridentatus</i>
River Lamprey	<i>Lampetra ayresi</i>

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**Common Name****Latin Name**

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**Mammals**

Big Brown Bat	<i>Eptesicus fuscus</i>
California Myotis	<i>Myotis californicus</i>
Canada Lynx	<i>Lynx canadensis</i>
Fisher	<i>Martes pennanti</i>
Fringed Myotis	<i>Myotis thysanodes</i>
Hoary Bat	<i>Lasiurus cinereus</i>
Keen's Myotis	<i>Myotis keenii</i>
Little Brown Myotis	<i>Myotis lucifugus</i>
Long-eared Myotis	<i>Myotis evotis</i>
Long-legged Myotis	<i>Myotis volans</i>
Marten	<i>Martes americana</i>
Masked Shrew	<i>Sorex cinereus</i>
Northern Water Shrew	<i>Sorex palustris</i>
Silver-haired Bat	<i>Lasionycteris noctivagans</i>
Western (Townsend's) Big-eared Bat	<i>Plecotus townsendii</i>
Wolverine	<i>Gulo gulo</i>
Yuma Myotis	<i>Myotis yumanensis</i>

**Amphibians and Reptiles**

Cascade Frog	<i>Rana cascadae</i>
Cascade Torrent Salamander	<i>Rhyacotriton cascadae</i>
Larch Mountain Salamander	<i>Plethodon larselli</i>
Long-toed Salamander	<i>Ambystoma macrodactylum</i>
Northwestern Salamander	<i>Ambystoma gracile</i>
Pacific Giant Salamander	<i>Dicamptodon tenebrosus</i>
Red-legged Frog	<i>Rana aurora</i>
Roughskin Newt	<i>Taricha granulosa</i>
Spotted Frog	<i>Rana pretiosa</i>
Tailed Frog	<i>Ascaphus truei</i>
VanDyke's Salamander	<i>Plethodon vandykei</i>
Western Pond Turtle	<i>Clemmys marmorata</i>
Western Redback Salamander	<i>Plethodon vehiculum</i>
Western Toad	<i>Bufo boreas</i>

**Invertebrates: Insects**

Beller's Ground Beetle	<i>Agonum belleri</i>
Carabid Beetle	<i>Bembidion gordonii</i>
Carabid Beetle	<i>Bembidion stillaquamish</i>
Carabid Beetle	<i>Bembidion viator</i>
Carabid Beetle	<i>Bradycellus fenderi</i>
Carabid Beetle	<i>Nebria gebleri cascadenensis</i>
Carabid Beetle	<i>Nebria kincaidii balli</i>
Carabid Beetle	<i>Nebria paradisi</i>
Carabid Beetle	<i>Omus dejeanii</i>
Carabid Beetle	<i>Pterostichus johnsoni</i>
Fender's Soliperlan Stonefly	<i>Soliperla fenderi</i>
Hatch's Click Beetle	<i>Eanus hatchii</i>

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**Common Name****Latin Name**

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Johnson's (mistletoe) Hairstreak

*Mitoura johnsoni*

Long-horned Leaf Beetle

*Donacia idola***Invertebrates: Mollusks**

Blue-gray Taildropper

*Prophysaon coeruleum*

Oregon Megomphix

*Megomphix hemphilla*

Papillose Taildropper

*Prophysaon dubium*

Puget Oregonian

*Cryptomastix devia*

Snail

*Valvata mergella*

**Exhibit B: “Pay-as-you-go” Species (shown in plain type). (Note that species for which post-termination mitigation will be required are shown in bold type).**

<b>Common Name</b>	<i>Latin Name</i>
<b>SPECIES OF GREATEST CONCERN</b>	
<b>Birds</b>	
Bald Eagle	<i>Haliaeetus leucocephalus</i>
Common Loon	<i>Gavia immer</i>
Marbled Murrelet	<i>Brachyramphus marmoratus</i>
Northern Goshawk	<i>Accipiter gentilis</i>
Northern Spotted Owl	<i>Strix occidentalis caurina</i>
Peregrine Falcon	<i>Falco peregrinus</i>
<b>Fish</b>	
<b>Bull Trout</b> <sup>1,2,3</sup>	<i>Salvelinus confluentus</i>
<b>Chinook Salmon</b> <sup>2</sup>	<i>Oncorhynchus tshawytscha</i>
<b>Coho Salmon</b> <sup>2</sup>	<i>Oncorhynchus kisutch</i>
Pygmy Whitefish	<i>Prosopium coulteri</i>
<b>Sockeye Salmon</b> <sup>2</sup>	<i>Oncorhynchus nerka</i>
<b>Steelhead Trout</b> <sup>2</sup>	<i>Oncorhynchus mykiss</i>
<b>Mammals</b>	
Gray Wolf	<i>Canis lupus</i>
Grizzly Bear	<i>Ursus arctos</i>

<b>OTHER SPECIES OF CONCERN</b>	
<b>Common Name</b>	<i>Latin Name</i>
<b>Birds</b>	
Band-tailed Pigeon	<i>Columba fasciata</i>
Black Swift	<i>Cypseloides niger</i>
Brown Creeper	<i>Certhia americana</i>
Golden Eagle	<i>Aquila chrysaetos</i>
Great Blue Heron	<i>Ardea herodias</i>
Harlequin Duck	<i>Histrionicus histrionicus</i>
Merlin	<i>Falco columbarius</i>
Olive-sided Flycatcher	<i>Contopus borealis</i>
Osprey	<i>Pandion haliaetus</i>
Pileated Woodpecker	<i>Dryocopus pileatus</i>
Rufous Hummingbird	<i>Selasphorus rufus</i>
Three-toed Woodpecker	<i>Picoides tridactylus</i>
Vaux's Swift	<i>Chaetura vauxi</i>
Western Bluebird	<i>Sialia mexicana</i>
Willow Flycatcher	<i>Empidonax traillii</i>
<b>Fish</b>	
<b>Cutthroat Trout, sea run</b> <sup>2</sup>	<i>Oncorhynchus clarki</i>
<b>Kokanee</b> <sup>2</sup>	<i>Oncorhynchus nerka</i>
<b>Pacific Lamprey</b> <sup>1,2</sup>	<i>Entosphenus tridentatus</i>
<b>River Lamprey</b> <sup>1,2</sup>	<i>Lampetra ayresi</i>

---

**Common Name****Latin Name**

---

**Mammals**

Big Brown Bat	<i>Eptesicus fuscus</i>
California Myotis	<i>Myotis californicus</i>
Canada Lynx	<i>Lynx canadensis</i>
Fisher	<i>Martes pennanti</i>
Fringed Myotis	<i>Myotis thysanodes</i>
Hoary Bat	<i>Lasiurus cinereus</i>
Keen's Myotis	<i>Myotis keenii</i>
Little Brown Myotis	<i>Myotis lucifugus</i>
Long-eared Myotis	<i>Myotis evotis</i>
Long-legged Myotis	<i>Myotis volans</i>
Marten	<i>Martes americana</i>
Masked Shrew	<i>Sorex cinereus</i>
Northern Water Shrew	<i>Sorex palustris</i>
Silver-haired Bat	<i>Lasionycteris noctivagans</i>
Western (Townsend's) Big-eared Bat	<i>Plecotus townsendii</i>
Wolverine	<i>Gulo gulo</i>
Yuma Myotis	<i>Myotis yumanensis</i>

**Amphibians and Reptiles**

Cascade Frog	<i>Rana cascadae</i>
<b>Cascade Torrent Salamander</b> <sup>3</sup>	<b><i>Ryacotriton cascadae</i></b>
Larch Mountain Salamander	<i>Plethodon larselli</i>
<b>Long-toed Salamander</b> <sup>3</sup>	<i>Ambystoma macrodactylum</i>
Northwestern Salamander	<i>Ambystoma gracile</i>
<b>Pacific Giant Salamander</b> <sup>3</sup>	<b><i>Dicamptodon tenebrosus</i></b>
Red-legged Frog	<i>Rana aurora</i>
Roughskin Newt	<i>Taricha granulosa</i>
Spotted Frog	<i>Rana pretiosa</i>
Tailed Frog <sup>3</sup>	<i>Ascaphus truei</i>
VanDyke's Salamander	<i>Plethodon vandykei</i>
Western Pond Turtle	<i>Clemmys marmorata</i>
Western Redback Salamander	<i>Plethodon vehiculum</i>
Western Toad	<i>Bufo boreas</i>

**Invertebrates: Insects**

Beller's Ground Beetle	<i>Agonum belleri</i>
<b>Carabid Beetle</b> <sup>3</sup>	<b><i>Bembidion gordonii</i></b>
<b>Carabid Beetle</b> <sup>3</sup>	<b><i>Bembidion stillaquamish</i></b>
Carabid Beetle	<i>Bembidion viator</i>
Carabid Beetle	<i>Bradycellus fenderi</i>
<b>Carabid Beetle</b> <sup>3</sup>	<b><i>Nebria gebleri cascadenensis</i></b>
<b>Carabid Beetle</b> <sup>3</sup>	<b><i>Nebria kincaidi balli</i></b>
<b>Carabid Beetle</b> <sup>3</sup>	<b><i>Nebria paradisi</i></b>
Carabid Beetle	<i>Omus dejeanii</i>
<b>Carabid Beetle</b> <sup>3</sup>	<b><i>Pterostichus johnsoni</i></b>
<b>Fender's Soliperlan Stonefly</b> <sup>3</sup>	<b><i>Soliperla fenderi</i></b>
Hatch's Click Beetle	<i>Eanus hatchii</i>

<b>Common Name</b>	<b>Latin Name</b>
Johnson's (mistletoe) Hairstreak	<i>Mitoura johnsoni</i>
Long-horned Leaf Beetle	<i>Donacia idola</i>
<b>Invertebrates: Mollusks</b>	
Blue-gray Taildropper	<i>Prophysaon coeruleum</i>
Oregon Megomphix	<i>Megomphix hemphilla</i>
Papillose Taildropper	<i>Prophysaon dubium</i>
Puget Oregonian	<i>Cryptomastix devia</i>
Snail	<i>Valvata mergella</i>

<sup>1</sup> Completion of certain studies described and budgeted in section 4.5.4, Watershed Aquatic Species Monitoring and Research, will be considered by the USFWS to be the substantially completed mitigation necessary for satisfying provisions of sections 6.3 and 6.4 of the Implementation Agreement. Specifically, the studies the USFWS needs to see completed include:

1. Bull trout surveys and relative population indices
  - A. Adult surveys through year 10, using methodology mutually agreed upon by the USFW and the City
  - B. Juvenile and emergent fry studies
2. Bull trout telemetry study to investigate occurrence of lake spawning
3. Bull trout redd inundation and egg mortality study

<sup>2</sup> Construction of the fish screens and fish ladders, proposed for HCP year 3, would, when shown to be successfully operating for a period of at least 2 years, substantially remove the potential take associated with the current lack of fish passage at Landsburg and the nearby pipeline. By making the water diversion structures at Landsburg and the pipeline essentially neutral to the up- and down-stream passage of anadromous fish (except the introduced sockeye), any take associated with those City facilities would be negligible.

<sup>3</sup> Road improvement included in the HCP (section 4.2) is focused on reducing sediment loading to streams and improving fish passage at road crossings. Benefits to aquatic species will increase over time with completion of specific road improvement projects through reduction of sediment loading levels to more natural levels and consequent improvement of aquatic habitat. To achieve a level of mitigation under the HCP that would not require any post-termination mitigation, the City will complete five years of the road improvement program specified in Section 4.2 of the HCP.

Road decommissioning included in the HCP is focused on reducing sediment loading to streams, improving fish passage at road crossings (by removal of roads), and reducing the road network to those roads needed for municipal watershed management under a program of no timber harvest for commercial purposes. Benefits to aquatic species will increase over time with decommissioning of specific road segments with potential to deliver sediment to streams through reduction of sediment loading levels to more natural levels and consequent improvement of aquatic habitat. To achieve a level of mitigation under the HCP that would not require any post-termination mitigation, the City will decommission 20 miles of roads under the program specified in section 4.2 of the HCP, and section 3.2.5 of the Final Mass Wasting and Surface Erosion Assessment Cedar River Watershed Habitat Conservation Plan (Foster Wheeler Env. Cop. 1995), with a priority on removal of road segments with a high potential for sediment delivery to streams.